(3)

Supreme Court, U.S.
FILED
SEP 29 1997
CLERK

No. 96-170

In The

Supreme Court of the United States

October Term, 1996

ROSS BROTHERS CONSTRUCTION COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES, LOCAL NO. 577, AFL-CIO,

Intervenor.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

GARY ALLEN SNYDER, ESQ.
SNYDER, RAKAY & SPICER
316 Talbott Tower
Dayton, OH 45402
(937) 228-2696

Attorney for Intervenor, United Association of Journeymen & Apprentices of the Plumbing and Pipefitting Industry of the United States, Local No. 577, AFL-CIO

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

20 pp

QUESTIONS PRESENTED

Given that the Labor Management Relations Act, codified in relevant part as 29 U.S.C. § 160(a), empowers the National Labor Relations Board to act to prevent any unfair labor practice regardless of any grievance/arbitration agreement between the two parties:

1. Whether the Court of Appeals for the Sixth Circuit erred in finding no abuse of discretion by the National Labor Relations Board over the Board's decision to retain jurisdiction over the dispute between the Petitioner, and the Intervenor rather than deferring the issue to a grievance/arbitration procedure contained in the National Industrial Maintenance Agreement to which both parties were bound.

2. Whether the decision by the National Labor Relations Board not to defer a dispute to arbitration where the grievance/arbitration procedure in the collective bargaining is not clear as to whether such a dispute is arbitrable, so far departs from the accepted and usual course of Board proceedings so as to warrant review by this Court.

PARTIES

The only remaining parties to this action are the Petitioner, Ross Brothers Construction Company, the Respondent, National Labor Relations Board, and the Intervenor, United Association of Journeymen & Apprentices of the Plumbing and Pipefitting Industry of the United States Local No. 577, AFL-CIO.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES ii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

ARGUMENT 6

I. The Policy Argument Relied Upon by the Petitioner is Fundamentally Opposed to the Language of 29 U.S.C. § 160(a), Which Grants the National Labor Relations Board the Authority to Intervene in a Dispute to Prevent the Commission of an Unfair Labor Practice Regardless of any Contractual Grievance Procedure 6

II. Unlike the Situations Considered by the National Labor Relations Board in *Collyer* and *United Technologies*, the Dispute Between the Petitioner and the Intervenor is Not Governed by the Grievance/Arbitration Provisions of the Collective Bargaining Agreement 9

III. The Decision by the National Labor Relations Board Does Not Depart From the Principles Established Under *Collyer* or *United Technologies* and Is Not a Significant Change in Philosophy Which Warrants Review 14

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

Collyer Insulated Wire, 192 N.L.R.B. 837 (1971) 9, 10, 12, 13, 14

Den-Ral, Inc., 315 N.L.R.B. 538 (1994) 1

Gulf State Manufacturers, 598 F2d 896 (5th Cir. 1979) 7

International Harvester Co., 138 N.L.R.B. 923 (1962) 13

Jos. Schlitz Brewing Company, 175 N.L.R.B. 23 10

Newspaper Guild Local 10 v. N.L.R.B., 63 F.2d 550 (D.C. Cir. 1980) 8

N.L.R.B. v. Acme Industrial Co., 385 U.S. 432 (1967) 8

N.L.R.B. v. Bay Shipbuilding Corp., 721 F.2d 187 (7th Cir. 1983) 8

N.L.R.B. v. C&C Plywood Corp., 385 U.S. 421 (1967) 13

N.L.R.B. v. Strong, 393 U.S. 357 (1969) 8

United Technologies, 286 N.L.R.B. 557 (1984) 9, 13, 14

STATUTES:

28 U.S.C. § 1254(1) 1

29 U.S.C. § 151 *et seq.* 7

29 U.S.C § 158(a)(1) 5

29 U.S.C. § 158(a)(5) 1, 5

29 U.S.C. § 160(a) 2, 6, 7, 9, 15

29 U.S.C. § 173(d) 2, 8

29 U.S.C. § 185 5

OPINIONS BELOW

The *per curiam* opinion of the Court below, No. 95-5135 dated April 29, 1997, is not officially reported and was not recommended for publication. It is unofficially reported as 1997 W.L. 215513, 1997 U.S. App. Lexis 1997. The decision of the Court denying the motion for rehearing and refusing the suggestion for rehearing *en banc* that was issued July 14, 1997, is not officially reported.

The decision of the National Labor Relations Board which adopted the decision of the Administrative Law Judge is reported as *Den-Ral, Inc.*, 315 N.L.R.B. 538 (1994). It is also reported at 148 L.R.R.M. 1304, 1994 W.L. 61618 (1994).

JURISDICTION

The decision of the Court of Appeals was entered April 29, 1997. On July 14, 1997, the Court denied Ross Brothers' *Motion for Rehearing and Suggestion for Rehearing En Banc*. The jurisdiction of this Court is being invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

National Labor Relations Act, Section 8(a)(5), 29 U.S.C. § 158(a)(5):

> (a) Unfair labor practices by employer It shall be unfair labor practice for an employer

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

National Labor Relations Act, Section 10(a), 29 U.S.C. § 160(a):

> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. *This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided,* that the Board is empowered by agreement with any agency of any State or Territory to cede such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications and transportation except where predominently local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has recieved a construction inconsistant therewith. [emphasis added].

Labor Management Relations Act, Section 203(d), 29 U.S.C. § 173(d):

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

STATEMENT OF THE CASE

The Petitioner, Ross Brothers Construction, is a party to a National Industrial Maintenance Agreement (NIMA) with the Intervenor, United Association of Journeymen & Apprentices of the Plumbing and Pipefitting Industry of the United States, Local Number 577, AFL-CIO. Appendix to Petition for Certiorari; *hereinafter* "Pet. App.", 21a. Article 8 of the NIMA Agreement provides that the employer parties to the Agreement will pay the wage rates "as set forth in the current Labor Agreement of the affiliated Local Union" in whose jurisdiction the employer contracts to work. Pet. App. 21a. In consideration of the payment of the local wage rates, the signatory unions refer employees to the NIMA employers when called upon to do so, and promise that there will be no work stoppages.

Prior to 1992, negotiations for the plumbing and pipefitting contract applicable to Local 577 had been between Local 577 and the Southern Ohio Mechanical Contractors Association, with the wages being negotiated on a multi-union, multi-employer basis between the Tri-State Building Trades and the Tri-State Contractors Association. Pet. App. 21a.

In 1991, one year prior to the expiration of the wage agreement with Tri-State, the Association proposed a premature opening of the agreement to negotiate a successor agreement to begin after the former agreement expired on May 31, 1992. Although the parties agreed to wage and benefit increases in May, 1991, Local 577 voted down the proposed increases and gave notice to the parties in June of 1991 that it was withdrawing from the Trades Council.

Pet. App. 30a-31a. Local 577 took the amount of increase called for by the unexpired agreement and gave notice to the Association that it would not extend the contract after its expiration. *Id.*

Local 577 then proceeded to negotiate a five (5) year agreement with a newly formed multi-employer bargaining group known as the Mechanical Contractors Association of Southern Ohio. *Id.* Ross Brothers received notice of the Local 577-Southeastern agreement by April 8, 1992 and received a copy of the agreement on June 8, 1992. Pet. App. 53a. Petitioner Ross Brothers has, at all times since June 1, 1992, refused to pay the new wages and fringes negotiated by Local 577. Pet. App. 37a.

Despite the Petitioner's reported references to "secret" meetings negotiations, and allegations of collusion on the part of Local 577 and the Mechanical Contractors Association of Southern Ohio, neither the Administrative Law Judge, the Board nor the Sixth Circuit took exception with the agreement reached between the Association and Local 577. Pet. App. 9a. Record evidence shows that after the new contract's execution, as many as 30 contractors signed the new agreement and complied with its terms. Pet. App. 38a. Ross Brothers is the only contractor who still refuses to do so. The Administrative Law Judge's opinion, which was adopted by the Board and undisturbed by the Sixth Circuit was that "There is no evidence in this record to suggest a discriminatory motive, discriminatory application of the new contract or conflict of interest." Pet. App. 45a.

On August 11, 1992, Local 577 filed an action against Ross Brothers in the United States District Court for the

Southern District of Ohio, under § 301 of the Labor Management Relations Act, for failure to pay wages and benefits under the new agreement. 29 U.S.C. § 185. On November 30, 1992, the national organization for Local 577, the United Association, filed a charge against Ross with the Board. The Board moved to intervene in the district court § 301 action. Although the district court denied that motion, the parties reached a settlement on the Board's appeal from that order, with Ross agreeing to allow the Board to intervene as a full party subject to the orders of the district court. Ross Brothers then filed a motion in the district court to stay all proceedings before the Board pending trial in the district court.

After a hearing before the Board, the Administrative Law Judge (ALJ) issued a decision finding that Ross violated § 8(a)(5) and (1) of the NLRA, 29 U.S.C. § 158(a)(5) and (1), by unilaterally refusing to pay wages and benefits that they were obligated to pay by the terms of the Local 577-Southeastern agreement. Pet. App. 67a. The Board adopted the findings of the ALJ and ordered Ross Brothers to cease and desist from unfair labor practices, to implement the wage and benefit terms of the Local 577-Southeastern agreement, and to make employees whole for any loss of wages and benefits suffered as a result of Petitioner's unfair labor practices. Pet. App. 70a-71a.

The National Labor Relations Board then made an Application for Enforcement of its order to the Court of Appeals for the Sixth Circuit. On April 29, 1997, the Court of Appeals issued a *per curiam* decision granting the Application for Enforcement. On July 14, 1997, the Court

also denied Ross Brothers' *Motion for Rehearing and Suggestion for Rehearing En Banc.* A *Motion to Stay Issuance of the Mandate* was granted on August 15, 1997. Ross Brothers is now before the United States Supreme Court requesting a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

ARGUMENT

I. The Policy Arguments Relied Upon by the Petitioner is Fundamentally Opposed to the Language of 29 U.S.C. § 160(a), Which Grants the National Labor Relations Board the Authority to Intervene in a Dispute to Prevent the Commission of an Unfair Labor Practice Regardless of any Contractual Grievance Procedure.

The Petitioner's first argument in favor of certiorari involves the refusal of the Administrative Law Judge to refer this matter to arbitration before ruling on the failure of Ross Brothers Construction to pay the wages required under the local agreement. Pet. 11-26. It is the Petitioner's contention that the charges under § 8(a)(1) and (5) of the National Labor Relations Act should have been dismissed and the dispute resolved through the grievance procedures contained in the NIMA Agreement, to which both parties were bound. *Id.*

The Petitioner's argument fails on two fronts. First, as will be discussed *infra,* there was no clear commitment by the parties to bind themselves to an arbitration/grievance procedure that would have jurisdiction over general

wage rate disputes. Secondly, and perhaps more importantly, is the fact that even if it can be shown that the grievance/arbitration procedures would apply to the dispute over wages, the National Labor Relations Board is still under no duty to send the dispute to arbitration.

A review by this Court would involve only questions of fact applied to familiar legal rules of the National Labor Relations Act. These legal rules were fully known to the Administrative Law Judge, the National Labor Relations Board, and the Court of Appeals for the Sixth Circuit at the time they made their respective decisions. Because this is simply an argument of the application of the facts by the Petitioner, and the Sixth Circuit Court of Appeals ruled that the Board's findings were supported by substantial evidence, the petition should be denied.

The Board derives its power and authority from the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* It is undisputed by the Petitioner, that the NLRA is empowered to prevent the commission of an unfair labor practice by any person. 29 U.S.C. § 160(a). This same section of the NLRA specifically and unequivocally states that "This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise." *Id.* This section has been cited to emphasize that the Board acts in the public interest to enforce public, not private rights, and that the "parties cannot by contractual agreement divest the Board's function to operate in the public interest." *Gulf State Manufacturers*, 598 F.2d 896, 901 (5th Cir. 1979) (*en banc.*) Backed by the force of this statute, the Sixth Circuit rejected the Petitioner's deferral argument and granted the *Application For Enforcement of an Order of*

the National Labor Relations Board. In doing so, the Sixth Circuit held:

> *Although arbitration is deemed a preferred means of settling labor disputes, "it is . . . settled that the Labor Board need not refrain from exercising its authority to enforce the Act merely because arbitration procedures are available." Newspaper Guild Local 10 v. N.L.R.B., 63 F.2d 550, 558-559 (D.C. Cir. 1980). Accord N.L.R.B. v. Bay Shipbuilding Corp., 721 F.2d 187, 191 (7th Cir. 1983) ("The availability of arbitration procedures does not oblige the Board from exercising its statutory authority.") (citing N.L.R.B. v. Strong, 393 U.S. 357, 360-61 (1969)). See also, e.g., N.L.R.B. v. Acme Industrial Co., 385 U.S. 432, 436-437 (1967) (finding no deferral of dispute over union's entitlement to information alleged as necessary to prepare case before arbitrator).*

To counter this obvious problem to its position, the Petitioner cites to Section 203(d) of the Labor Management Relations Act, which reads:

> *Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application of or interpretation of an existing collective bargaining agreement. 29 U.S.C. § 173(d).*

The shortcoming to the use of § 203(d) is addressed by the *Collyer Insulated Wire* decision upon which the Petitioner relies. 192 N.L.R.B. 837 (1971). In its analysis of the case, the *Collyer* Board acknowledged that Section 203 of the LMRA did not specifically apply to the National Labor Relations Board, and it cited several other decisions which held that the Board was under no statutory preclusion for hearing cases that had been submitted to

arbitration. *Id.* at 840. The decision by the Board to defer the dispute in *Collyer* to the grievance/arbitration provisions was a policy decision which was made about a grievance "well suited to resolution by arbitration" and clearly covered by the applicable contract language. *Id.* at 842. However, this narrow policy statement by the Board is now being twisted by the Petitioner to suggest that the Board must always defer to arbitration and grievance procedures, even through the applicable case law and 29 U.S.C. § 160(a) suggest otherwise. Such an application of Board policy is clearly erroneous and cannot override the clear delegation of power granted by Congress via 29 U.S.C. § 160(a).

II. Unlike the Situations Considered by the National Labor Relations Board in *Collyer*[1] and *United Technologies*,[2] the Dispute Between the Petitioner and the Intervenor is Not Governed by the Grievance/Arbitration Provisions of the Collective Bargaining Agreement.

The allegedly "conflicting" decisions relied upon by the Petitioner designed to show that the Board must defer to the grievance/arbitration provisions, are distinguishable on their facts. The Petitioner first cites to *Collyer Insulated Wire Co.* in support of its argument for deferral. 192 N.L.R.B. 837 (1971). This case provides for the deferral of disputes from the Board to the contractual

---

[1] 192 N.L.R.B. 837 (1971)

[2] 268 N.L.R.B. 557 (1984)

grievance machinery in limited circumstances.[3] Not surprisingly, the Petitioner fails to address the preliminary circumstances that must be present before the Board will exercise its discretion and allow the dispute to be heard before an arbitrator as called for by the terms of a collective bargaining agreement. For purposes of this dispute, the most important circumstance noted by the Board which must be present is a contract that "*clearly* provides for grievance and arbitration machinery". *Id.* at 841. The *Collyer* decision was based upon a collective bargaining agreement which "unquestionably obligates each party to submit to arbitration any dispute arising under the contract." *Id.* at 842. In the present situation, there was no clear, unquestionable commitment by the parties to use the grievance machinery of the NIMA Agreement. For that reason, the general deferral language of *Collyer* and other cases cited by the Petitioner offer little guidance to the outcome of this case.

The Petitioner is attempting to argue that the dispute between the Parties should have been dealt with through the terms of the NIMA Agreement. Pet. 11-26. The problem with this position is that there is a conflict between two provisions of the NIMA Agreement, which makes it

---

[3] The *Collyer* Board held *inter alia,* that the contract must clearly provide for grievance and arbitration; the unilateral action cannot be designed to undermine the Union; it cannot be patently erroneous, but must be based on a substantial claim of contractual privilege; and the arbitration interpretation of the contract must resolve the unfair labor practice issue and the contract interpretation issue in a manner compatible with the purposes of the Act. 192 N.L.R.B. 837, 891; *Citing, Jos. Schlitz Brewing Company,* 175 N.L.R.B. 23.

impossible to tell what was contemplated by the parties at the time they signed the document. The two articles of the NIMA Agreement which are relevant to the Petitioner's deferral argument are articles VIII and VI. The Petitioner relies upon Article VIII to argue that the dispute over the new wage rate should be submitted to arbitration. Article VIII provides:

> *Wage rates shall be those as set forth in the current Labor Agreement of the affiliated Local Union where such work is to be performed and shall be paid to all employees under the terms of this agreement unless otherwise modified by the National Maintenance Agreements Policy Committee, Inc.*

It is the Petitioner's position that the possibility of the modification of the wage rates by the National Policy Committee means the dispute over the new wage rate is appropriate for arbitration. However, an inherent conflict in the grievance/arbitration provisions arises out of article VI which reads:

> *Grievances, other than those pertaining to jurisdiction or general wage rates on any work covered by this agreement shall be handled in the following manner* [emphasis added]:
>
> *Step 1. . . .*
>
> *Step 2. . . .*
>
> *Step 3. . . .*
>
> *Step 4. If the parties are unable to effect an amicable settlement of [sic] adjustment of any grievance or controversy, such grievance or controversy shall be submitted to [NMAPC] for a decision to become effective immediately.*

> *Step 5. Failure of [NMAPC] to reach a decision shall constitute a basis for a submittal of the question to the American Arbitration Association for a binding decision . . . The affected parties to the arbitration shall equally share in the cost, including printing and publication of any record of such arbitration.*
>
> *The Arbitrator shall only have jurisdiction and authority to interpret, apply or determine compliance with the provisions of this Agreement.*

As a result of these two articles, the Board was forced to reconcile one provision of the Agreement that appears to contemplate modification of wage rates by the committee, and another provision which expressly excludes general wage rates from the grievance procedure. Unfortunately, such an inherent conflict cannot be fairly and equitably interpreted to reflect the true meaning and intent of the parties at the moment they signed the Agreement. It is this irreconcilable conflict between the provisions of the NIMA Agreement that distinguishes this case from the cases upon which the petitioner relies.

As discussed previously, the *Collyer* Board faced a situation in which there was an unquestionable commitment by the parties to be bound by the grievance/arbitration procedures. Therefore, the policy issues discussed by the Board in *Collyer* and cited by the Petitioner must be read in that context. It is highly probable that if the agreement were not so clear, and the Board could not be certain that both sides intended to be bound by its terms, that the decision to defer to the grievance machinery may have not been made. Nonetheless, because the background which provides the basis of the opinion is so

vastly different, the *Collyer* case is of little use in determining the proper outcome of this decision.

The Petitioner also relies upon *United Technologies* in an effect to bolster its deferral argument. 186 N.L.R.B. 557 (1984). Reliance on this case is also misplaced. The dispute at issue in *United Technologies* was a threat which was violative of Section 8(a)(1), but which was also *"clearly recognizable under the broad grievance/arbitration provision* of . . . the collective bargaining agreement." [emphasis added] *Id.* The lack of such a clear commitment to grievance/arbitration procedures involving wage rates, by Ross Brothers and Local 577 severely erodes any substantive precedential value of these deferral-type cases.

The dispute between the Petitioner and Local 577 is more properly resolved under the Supreme Court's decision in *N.L.R.B. v. C&C Plywood Corp.*, 385 U.S. 421 (1967). In that case, the Board issued a cease and desist order against an employer for the installation of a premium pay plan without the knowledge or consent of the Union. In overruling the Ninth Circuit which denied enforcement of the order, the Supreme Court noted that the absence of a grievance/arbitrator provision in the agreement meant that the Board's action "was in no way inconsistent with its previous recognition of arbitration as an instrument of national labor policy for composing contractual differences." *Id.* at 426, *citing, International Harvester Co.*, 138 N.L.R.B. 923 (1962). So too here, the exclusion of general wage rate disputes from the grievance/arbitration provisions of the NIMA agreement means that the Board in no way abused its discretion in refusing to defer the case to arbitration. Therefore, the petition should be denied.

III. The Decision by the National Labor Relations Board Does Not Depart From the Principles Established Under *Collyer*,[4] or *United Technologies*,[5] and Is Not a Significant Change in Philosophy Which Warrants Review.

As fully discussed *supra*, the *Collyer* and *United Technologies* decisions both stood for the general proposition that an employer and a Union who have established dispute resolution machinery culminating in final and binding arbitration, should have to use that mechanism prior to petitioning the Board for relief. This policy is based upon the belief that collective bargaining agreements which provide for final and binding arbitration of disputes and grievances encourage industrial peace and stability. *Collyer* at 840. The refusal to send the dispute to arbitration as demanded by the Petitioner in no way erodes these important objectives. In cases where it is clear that both parties have voluntarily and knowingly bargained away important rights and have subjected themselves to broad arbitration provisions, deferral to that machinery will continue to be an appropriate policy decision by the Board. However, in cases such as this, where ambiguity prevents the Board from finding that both parties clearly committed themselves to a particular grievance procedure it is appropriate and equitable for the Board to retain jurisdiction over the dispute.

---

[4] 192 N.L.R.B. 837 (1971)

[5] 268 N.L.R.B. 557 (1984)

CONCLUSION

The National Labor Relations Act specifically grants the National Labor Relations Board the power to prevent the commission of an unfair labor practice by any person. 29 U.S.C. § 160(a). This same Section of the Code also states that this power will not be affected by any other agreement between the parties. *Id.* Although it is true that the Board follows a general policy of deferral in cases where it is clear that both sides have committed themselves to grievance/arbitration provisions, this is not such a case. The conflict between the dueling provisions of the agreement means that the Board was clearly justified in refusing to send the dispute to arbitration as demanded by the Petitioner. The action by the board was not a substantial deviation from the accepted and usual course of proceedings, nor was it an abuse of discretion. For these reasons, the Petition for a writ of certiorari should be denied.

Respectfully submitted:

GARY A. SNYDER
SNYDER, RAKAY & SPICER
316 Talbott Tower
Dayton, OH 45402
(937) 228-2696

Attorney for Intervenor, United Association of Journeymen & Apprentices of the Plumbing and Pipefitting Industry of the United States, Local No. 577, AFL-CIO

SEPTEMBER 1997